UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 07-CA-215036

Nexteer Automotive Corp.,

and

Local 699, International Union,
United Automobile, Aerospace
and Agricultural Implement
Workers of America (UAW),
AFL-CIO

BRIEF FOR RESPONDENT NEXTEER AUTOMOTIVE CORP.

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Respondent,	)	Case No. 07-CA-215036
	)	
and	)	
	)	
LOCAL 699, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO	)	
	)	
Charging Party.	)	

RESPONDENT NEXTEER AUTOMOTIVE CORP.'S POST-HEARING BRIEF

Respondent Nexteer Automotive Corp. ("Nexteer" or "Respondent"), by and through its attorneys and pursuant to Section 102.42 of the National Labor Relation Board's ("the Board") Rules and Regulations, submits this Post-Hearing Brief to Administrative Law Judge ("ALJ") Paul Bogas in connection with the above-captioned proceeding. The evidence presented at the hearing conducted on August 6, 2018 overwhelmingly shows that the Counsel for the General Counsel ("General Counsel") failed to establish that Respondent violated the National Labor Relations Act ("the Act") by terminating Joshua Nuffer-Bauer ("Bauer") for his threatening, intimidating, and hostile outburst. Moreover, the General Counsel failed to establish Respondent disparately applied its work rules to discriminate against Bauer. Accordingly, the Complaint issued on behalf of Local 699, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO ("the UAW" or "the Union") should be dismissed in its entirety.

I. STATEMENT OF THE CASE

The UAW filed an unfair labor practice charge, Charge No. 07-CA-215036, on or about February 16, 2018. On or about April 9, 2018, the Regional Director for Region 7, Dennis Boren, issued a Complaint alleging Respondent violated Sections 8(a)(1) and (3) of the Act by enforcing work Shop Rules #9 and #13 "selectively and disparately by discharging its employee [Bauer], a union representative, while he was engaged in representing union employees" and because Bauer assisted the Union and engaged in concerted activities. (GC Ex. 1(g), ¶ 7-9(a))[1]. The Complaint also asserts that Respondent violated Section 8(a)(4) of the Act by discharging Bauer because he filed charges and gave testimony under the Act in prior cases. (Id., ¶ 9(b)).

The allegations set forth in the Complaint should be dismissed. The evidence presented at hearing demonstrates that on December 13, 2017, Bauer threatened C Shift Plant 3 Area Manager Benny Taylor ("Taylor"), pointing his finger at Taylor while aggressively yelling "fuck you" repeatedly and getting within inches of Taylor. Bauer has a history of aggressive outbursts and a documented disrespect for Nexteer and its management. While the profanity was not out of character for Bauer, this time he coupled his profanity with physical intimidation when he rose out of his chair and got close to Taylor, pointing, and yelling aggressively. Under the standard set forth in *Atlantic Steel*, 245 NLRB 814 (1979), Bauer's misconduct lost its protection under the Act. Moreover, there is absolutely no evidence Nexteer disciplined Bauer in retaliation for his prior involvement in Board proceedings. Instead, Bauer was discharged solely as a result of his violation of Shop Rule #9 which prohibits "[a]ssaulting, threatening, intimidating, coercing or interfering with supervision." Bauer's discharge was consistent with established Board law and is

[1] References to the hearing transcript will be "Tr." followed by the appropriate page number. General Counsel exhibits, Union exhibits, and Respondent exhibits will be referenced as "GC. Ex.," "U. Ex.," or "R. Ex." respectively followed by the exhibit number.

not violative of the Act. In short, the allegations in the Complaint are meritless and should be dismissed.

II. ISSUES PRESENTED

1. Did Nexteer lawfully discharge Bauer under the standard set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979) where his violent, profane, and threatening outburst toward Area Manager Taylor lose the Act's protection?

2. In the alternative, did Nexteer discharge Bauer in retaliation for his involvement in prior Board proceedings?

3. Did Nexteer violate the Act by enforcing Shop Rules #9 and #13 selectively and disparately by discharging Bauer, a Union steward, for his violent, profane, and threatening outburst toward Area Manager Taylor?

III. STATEMENT OF FACTS

A. Bauer's Disciplinary History Demonstrates His Chronic Disregard for Respondent and His Supervisors and Reasonable Standards for Proper Workplace Conduct

Bauer began working for Nexteer in June 2011 as a machine operator. (Bauer Tr. 17). For the three years prior to his discharge, Bauer served as District 13 committeeperson for the Union. (Bauer Tr. 18). In this role, he was released from other work functions full-time and spent his entire day completing Union duties. (Id.). Despite his rather short tenure with Nexteer, Bauer managed to accumulate a number of disciplines for serious misconduct. Included in this chain of discipline were a number of instances where Bauer demonstrated his complete disregard for Nexteer and blatant disrespect for supervisors. For instance, on April 30, 2013, Bauer received a balance of shift ("BOS") plus two-weeks suspension for violating Shop Rule #9 – the same Shop Rule involved in the instant case after calling his supervisor a "pompous jackass." (Bauer Tr. 51;

R. Ex. 8). The Union ultimately agreed that Bauer deserved discipline and a one-week suspension was appropriate. (R. Ex. 9). Less than two months' later, on May 15, 2013 Bauer received a BOS plus 30 days suspension for violating Shop Rule #29, wasting time. (R. Ex. 10). The Union grieved this discipline but ultimately agreed that a BOS plus one week suspension was appropriate for Bauer's misconduct. (R. Ex. 11).

In another demonstration for his lack of respect for supervisors, on March 4, 2015, Bauer received another BOS plus 30-days suspension for a violation of Shop Rules #9 and #13. (R. Ex. 12). In response to Supervisor Sophia Staples' ("Staples") questioning of Bauer's movement of personnel without permission (the subject of previous discipline), Bauer began yelling, arguing he was sick of management's "bullshit" before storming out of the office. (Bauer Tr. 47; R. Ex. 12). Bauer admitted he used profanity in response to a civilized question by a supervisor. (Bauer Tr. 47). He did not deny yelling the profanity. This was unacceptable behavior and the Union agreed. While the Union grieved the discipline, it ultimately agreed a BOS plus one-week suspension was appropriate in response to Bauer's actions. (R. Ex. 13).

Despite the numerous warnings, Bauer continued to display blatant contempt for the Company. Less than five months after his outburst at Staples, Bauer made improper remarks to another supervisor. On this occasion, he made an inappropriate comment about a general foreman's sex life in the presence of other employees. (R. Ex. 14). Ultimately, Nexteer and the Union agreed discipline was warranted and that a BOS plus two-week suspension would be served. (R. Ex. 15). Bauer was then terminated on October 15, 2015 for violating Shop Rule #18, "distracting the attention of others or otherwise causing confusion by unnecessary demonstration of any kind on Company premises." (Getgood[2] Tr. 149; R. Ex. 16). This discipline was resolved

[2] Denny Getgood ("Getgood") is currently the safety representative for Plants 4 and 8 but prior to the fall of 2017, he was the Plant 3 HR Business Partner. (Getgood Tr. 136).

as part of negotiations for a new collective bargaining agreement after the Union conditioned the tentative agreement on Bauer being reinstated. (Getgood Tr. 150; U. Ex. 1).[3]

B. Bauer Was Terminated as a Result of His Violent and Intimidating Outburst

Throughout his time as a Union committeeman, Bauer demonstrated a wanton disregard for generally-accepted standards of decorum in the workplace. He routinely chose to interact with supervisors using profanity and displaying contempt. Despite the fact that he was frequently disciplined for his misconduct, he failed to correct his behavior. Instead, on December 13, 2017, Bauer again engaged in one of his profane outbursts, only this time coupled with physical intimidation; at one point, standing over Taylor with his fists balled hurling profanities. (Bell Tr. 81).

On November 9, 2017, Bauer met with HR Manager, Steering Division Dereon Pruitt ("Pruitt"),[4] Human Resources Partner Allison Bell ("Bell"), and Union shop committeeperson JoAnn Reyna-Frost ("Reyna-Frost") to discuss issues Bauer had within Plant 3. (Bell Tr. 71). Bauer complained about personal issues he was having with group leaders, Nexteer's front-line supervisors. (Id.). During this meeting, Pruitt asked whether Bauer had raised any of these concerns to Area Manager Benny Taylor ("Taylor"). (Bell Tr. 72).[5] Once Bauer admitted he had not raised issues to Taylor, Pruitt told Bell to set up a meeting with Bauer, Bell, and Taylor. (Id.). Bell coordinated the meeting, scheduling it for November 29, 2017. (Bell Tr. 73). Bauer never responded regarding his availability so Bell rescheduled the meeting for December 13, 2017. (Id.).

[3] The Union and the General Counsel never refuted that the contract settlement was tied to Bauer's reinstatement.
[4] Pruitt Tr. 176.
[5] Significant to the credibility of Bauer and his claims of mistreatment by group leaders is that he never filed any grievances over any of the alleged acts of mistreatment even though he concedes his practice is to file "a lot of grievances." (Bauer Tr. 56).

The meeting on December 13, 2017 took place in Bell's office. (Bell Tr. 73; R. Ex. 1 & 2). Bell's office is approximately 9.5 feet by 12 feet in size with a desk and two visitor chairs. (Bell Tr. 75; R. Ex. 1 & 2). During the meeting Bauer and Taylor sat in the visitor chairs while Bell sat behind her desk. (Bell Tr. 74). Even though the meeting was set for the express purpose of addressing Bauer's concerns, Bell testified Bauer appeared agitated from the beginning, clenching a pen and wringing it in his hands. (Bell Tr. 79). Taylor confirmed Bauer was aggressive from the beginning of the meeting. (Taylor Tr. 106). Prior to the meeting Taylor had not experienced any problems with Bauer but was interested in working out differences between Bauer and some shift leaders. (Taylor Tr. 105). Bauer brought up a number of issues including an incident where an employee threw up on the plant floor. (Bell Tr. 77). At the point in the meeting where the puking incident was discussed, Bauer was yelling and his face was changing colors. (Id.). Taylor did not have a chance to respond because Bauer was changing the subject frequently and not allowing anyone else to contribute. (Bell Tr. 78). In totality, Bauer spoke approximately 85% of the time. (Bell Tr. 87; Taylor Tr. 110). Despite Bauer's claim that he and Taylor were "50/50" in their use of profanity, with Bauer maybe using a little more (Bauer Tr. 40), both Taylor and Bell denied Taylor used any profanity. (Bell Tr. 81; Taylor Tr. 109).

Bauer eventually raised the issue of departmental staffing and Taylor responded, mentioning problems with absenteeism. (Bell Tr. 78-79). When Taylor mentioned absenteeism, Bauer became even more upset, his face visibly changing colors and wringing the pen more aggressively. (Bell Tr. 79). Bauer then began pointing at Bell as she sought to discuss the staffing issue. (Id.). He told Taylor that employee absenteeism was "not my fucking problem…" (Bell Tr. 80). Bauer then stood up from his chair so he was standing over Taylor, pointing and saying, "Fuck you, fuck you, Benny, fuck you, Benny Taylor." (Bell Tr. 80; Taylor Tr. 108). Taylor had

to lean back to get out of Bauer's away to avoid physical contact from Bauer. (Bell Tr. 80). At one point during this rant, Bauer had his fists clenched and was a mere twelve to sixteen inches away from Taylor. (Bell Tr. 82). Taylor was concerned Bauer might "do something" based on his demeanor and even put his hands up in defense. (Taylor Tr. 110, 115). At this point, Bell started walking toward her office door, stating that the meeting was over. (Bell Tr. 81). She opened her office door to escort Bauer out and while the door was open, Bauer said "fuck you" a couple more times as he was leaving. (Bell Tr. 81; Taylor Tr. 110, 131). He said it loud enough so that other employees outside Bell's office could hear. (Bell Tr. 81; Taylor Tr. 110). Bauer conceded in his testimony that engineers were present. (Bauer Tr. 49).

After Bauer departed and the meeting was over, Bell called her supervisor Pruitt to report what happened. (Bell Tr. 82). Bell did not immediately suspend Bauer at the end of the meeting because she wanted to ensure that she appropriately addressed the situation given that Bauer was a union official. (Id.).[6] After discussing the incident, Bell wrote a statement of her encounter with Bauer. (Bell Tr. 84; R. Ex. 3). Taylor wrote his statement upon his arrival at work on December 14, 2017.[7] (R. Ex. 7). Prior to disciplining Bauer, in accordance with the collective bargaining agreement between Nexteer and the Union ("the Agreement"), Bell conducted a fact-finding meeting with Bauer, referred to by the parties as a "76A conference." (Bell Tr. 85). This conference was delayed because Bauer failed to attend the first scheduled interview. (Bell Tr. 100). Reyna-Frost served as Bauer's Union representative during this meeting. (Id.). During this

[6] While General Counsel has attempted to make much of the failure of Nexteer to take immediate action toward Bauer such as a suspension, any preemptive action before the investigation was complete would have led inevitably to a claim of denial of due process and retaliation. Given that Bauer was a union official with a prior Board case, Nexteer cannot be faulted for exercising care in this instance. Basically, damned if you do and damned if you don't. The timing of the discharge was also delayed by Bauer's failure to attend the first scheduled interview with Bell. (Bell Tr. 100).

[7] The meeting on December 13, 2017 occurred at the end of Taylor's shift and he went home following. He was asked to write his statement when he returned to work the next day. (Taylor Tr. 112).

meeting, Bauer remained defiant and failed to respond to the questions asked and instead provided flippant responses. For instance, when asked what he said, Bauer responded "words." (R. Ex. 4). He never denied engaging in the misconduct as alleged. Neither Bauer nor Reyna-Frost challenged in his testimony the accuracy of the contents of the 76A interview notes.

Following the 76A interview and internal discussions, Bauer was discharged based on his violation of Shop Rule #9 as a result of his threatening behavior.[8] (Bell Tr. 88; GC Ex. 5). While it took Nexteer a few days to discharge Bauer for his misconduct, Nexteer was exercising its due diligence in its decision making including discussions between Pruitt, General Director of HR for North America Tony Behrman ("Behrman") and in-house attorney Tamika Frimpong ("Frimpong"). (Pruitt Tr. 180). This did not minimize Bauer's misconduct in any way. Bauer was not discharged because he raised workplace concerns, or because he was engaged in appropriate actions as a Union representative, or in retaliation for his previous Board filings. (Bell Tr. 88). Bauer was discharged only because he engaged in behavior which was so opprobrious as to lose the Act's protection.

Nexteer has a code of conduct and a workplace violence policy which prohibit the very type of conduct in which Bauer engaged. (Bell Tr. 91; R. Exs. 19 & 21). Notably, the workplace violence policy prohibits "conduct. . . which creates an intimidating, offensive, or hostile environment." (R Ex. 19). The Code of Conduct similarly cautions that "Nexteer will not tolerate any acts or threats of violence, including inappropriate verbal or physical threats, intimidation, harassment, or coercion." (R. Ex. 21). It further cautions that "[a]ny violation of the Code,

[8] Bauer was not terminated as the result of Nexteer's application of progressive discipline, rather in response to his threatening behavior. (Bell Tr. 99-100). As Bell testified, the collective bargaining agreement references progressive discipline but does not establish any specific steps which must be followed in applying progressive discipline. (Bell Tr. 99). Rather, the agreement provides that the discipline imposed in any case will "depend[] upon the seriousness of the offense in the judgment of Management." (GC Ex. 2, p. 155) (Emphasis added).

including the workplace violence policy, may result in disciplinary action – up to and including termination. (Id.). Bauer received training on both of these policies in 2017. (Bell Tr. 91; Getgood Tr. 151-52; R. Ex. 20; R. Ex. 21; R. Ex. 22). Despite this training and his knowledge of Nexteer's policies and expectations, Bauer repeatedly lashed out at supervision under the guise of union activity. On December 13, 2017, Bauer took his misconduct too far when he coupled his usual profanity with threatening and intimidating behavior. For this misconduct, Bauer was discharged. (GC Ex. 5). Bauer was treated no differently than other employees who engaged in violations of the workplace violence policy or Shop Rule #9. (R. Ex. 24 & R. Ex. 25; Bell Tr. 91-92).[9]

IV. LEGAL ARGUMENT

A. Bauer and Reyna-Frost's Testimony Was Not Credible Where it Was Self-Serving and Corroborated or Otherwise Supported by the Record

To the extent Bauer's testimony was inconsistent with that of Bell and Taylor, Bauer's testimony should be rejected as lacking credibility. Bauer's testimony was obviously self-serving as he downplayed his misconduct during the December meeting. While Bauer gave rambling detailed testimony in response to nearly every question, when it came to the subject of his misconduct, he testified only briefly that he said, "Really, Benny, go fuck yourself" and walked out of Bell's office. (Bauer Tr. 36). Instead, both Bell and Taylor testified as to Bauer's aggressive demeanor, raised volume, and repeated profanities. This was confirmed in their contemporaneous notes regarding the meeting, prepared separately. (R. Exs. 3 & 7).

During his employment with Nexteer, Bauer repeatedly toed the line of acceptable conduct and was disciplined when he took his actions too far. The Union would agree discipline was appropriate and the facts were rarely in dispute. In fact, Bauer admitted to the wrongdoing that

[9] No evidence was presented of cases in which other employees engaged in comparable behavior and were not discharged. To the contrary, the evidence is unrefuted that Bauer's termination was consistent with Respondent's historic practices. (R. Ex. 24 & 25).

led to some of his previous discipline. (Bauer Tr. 47, 53). Only now where the facts leading to discipline are essential to the case does Bauer summarily deny engaging in misconduct. While Bauer has frequently used profanity toward supervisors, Nexteer has not discharged him for mere profanity but has instead sought to correct his behavior with progressive discipline. *See e.g.* R. Ex. 8-16. It seems illogical that Nexteer would suddenly discharge Bauer for saying "fuck off" to Taylor – especially where he engaged in such misconduct previously and was not terminated. (R. Ex. 14). Instead, Bauer clearly downplayed his actions during the meeting in an obvious attempt to save his job.

In contrast to Bauer's testimony, Taylor and Bell corroborated each other's testimony and left no doubt that Bauer engaged in threatening and intimidating misconduct.[10] In fact, both Taylor and Bell wrote statements after the incident memorializing what occurred. (R. Ex. 5 & R. Ex. 7). While the General Counsel attempted to point out minor details that were omitted from the statements, the statements were wholly consistent with the testimony provided. When drafting the statements, Bell and Taylor may not have realized that certain details were important, i.e. whether the office door was open and when; however, they both testified credibly as to the specific details of the incident. Similarly, while Taylor noted he remained calm in his statement, this does not contradict his testimony at hearing that he raised his hands defensively in response to Bauer. Bauer even confirms Taylor raised his hands. (Bauer Tr. 35). In writing his statement, Taylor merely noted that he was not hostile but did not record every nuance of the interaction. This in no way undermines Taylor's credibility where his statement is not inconsistent with his testimony.

[10] Neither Bell nor Taylor had been involved in any of the prior cases of Bauer's misconduct. It is also significant that Bell had been in her HR role a matter of weeks and the December 13 meeting was only her second interaction with Bauer. In other words, she had no "history" with Bauer which would cause her to embellish her testimony or give Bauer a reason to be exorcised. Also bearing on Bauer's credibility with respect to the December 13 meeting is the undisputed evidence of his conflicts with numerous other members of management, in many instances resulting in discipline agreed to by the Union.

Bauer never wrote a statement. In fact, during the 76A interview when given an opportunity to provide his side of the story, Bauer chose to be uncooperative and give short, flippant responses to Bell's questions.[11] If Bauer had truly acted as he claims and only said "fuck off" to Taylor, he could have stated as such during his interview. He did not. He only raised that defense at the hearing. Considering all the evidence, Bauer's version of the December 13 meeting is simply not credible.

Further, Bauer and Reyna-Frost gave inconsistent testimony. While Reyna-Frost testified that Bell made a comment in the November 9, 2017 meeting that "when she hears Bauer she thinks NLRB," Bauer in his testimony made no mention of this statement. If in fact Bell made such a statement, demonstrating some animus toward Bauer for his prior Board activities, it seems unlikely that Bauer would have forgotten. Instead, both Bell and Pruitt denied any such statements were made. (Bell Tr. 72; Pruitt Tr. 178-79). It strains credibility that Bell would make the comment that Reyna-Frost attributes to her when she literally had just started in her HR role and had no prior dealings with Bauer.

B. Bauer's Misconduct Lost Its Protection Under the Act and was Proper Grounds for Discharge

When viewed against the factors established in the Board's seminal decision of *Atlantic Steel Co.*, 245 NLRB 814 (1979), Bauer's threatening behavior lost its protection under the Act. As demonstrated by his history of hostile outbursts, Bauer refused to abide by Nexteer's work rules and this time took his hostility too far – turning a respectful conversation about Bauer's issues into a violent act where he intimidated and threatened Taylor to the point Taylor was concerned for his safety and put his hands up in self-defense. (Taylor Tr. 110, 115). Based on this hostile and threatening behavior, Nexteer was justified in terminating Bauer.

[11] Again, neither Bauer nor Reyna-Frost disputed the accuracy of the 76A report. (R. Ex. 4).

The Board holds:

> Where an employee engages in indefensible or abusive misconduct during otherwise protected activity, the employee forfeits the Act's protection. Whether the Act's protection is lost depends on a balancing of four factors: (1) the place of the discussion between the employee and the employer; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

DaimlerChrysler Corp., 344 NLRB 1324, 1329 (2005) (citing *Atlantic Steel*). "Although employees are permitted some leeway for impulsive behavior when engaging in concerted activity, this leeway is balanced against an employer's right to maintain order and respect in the workplace." *Piper Realty*, 313 NLRB 1289, 1290 (1994). Moreover, "[w]here an employee engages in indefensible or abusive misconduct during otherwise protected activity, the employee forfeits the Act's protection." *Id.*

The Board has recognized that employers have a right and responsibility to maintain workplaces free from threats of violence. "[T]he Board will not second-guess an employer's efforts to provide its employees with a safe workplace, especially where threatening behavior is involved." *Bridgestone Firestone S.C.*, 350 NLRB 526, 531 (2007), *citing Tenneco Packaging, Inc.*, 337 NLRB 898 (2002), *review denied* 350 F.3d 105 (D.C. Cir. 2003); *Clark Equipment Co.*, 250 NLRB 1333 (1980). The Board further went on to emphasize, "Employers justifiably are more concerned today than ever about workplace violence and they must remain free to quickly address genuine threats." *Id.* at 536. In this case, Bauer was not privileged to engage in threatening and hostile behavior, even if such threats occurred during the course of union activity.

A review of each of the *Atlantic Steel* factors demonstrates Bauer's actions in this matter lost protection under the Act and Nexteer properly discharged Bauer. As set forth in more detail below, three of the four *Atlantic Steel* factors weigh in favor of the conclusion that Bauer's actions

lost protection while the fourth remains neutral. The Board has made clear that not all factors must weigh against protection in order for the actions to lose the Act's protection. Where one factor weighs heavily in favor of losing protection, this is sufficient to remove the misconduct from the Act's protection. *See e.g. Trus Joist Macmillan*, 341 NLRB 369, 371-372 (2004). Here, Bauer's threatening and violent outburst, occurring where other employees could hear and being unprovoked by anything Bell or Taylor said or did, was so egregious to lose protection under the Act.

1. Bauer's Profane Outburst Occurred Where Other Employees Could Hear, Undermining Respondent's Authority

"The location of an employee's conduct weighs against protection when the employee engages in subordinate or profane conduct toward a supervisor in front of other employees . . . ***The question is whether there is a likelihood that other employees were exposed to the misconduct.***" *Starbucks Corp.*, 354 NLRB 876, 878 (2009) (emphasis added) (finding that even profane conduct in front of off-duty employees weighed in favor of losing the Act's protection). Here, while Bauer's misconduct began in an office, he made sure draw attention to himself when he continued yelling "fuck you" after Bell had opened the door, in an apparent attempt to have employees nearby take note of his actions. Where it is "reasonable to assume that others likely overheard" the comments, the location of Bauer's outburst must weigh against protection under the Act. *Cellco Partnership*, 349 NLRB 640, 643 (2007).

Even with the door closed, the volume of Bauer's outburst alone was likely sufficient for employees to hear through a closed door. Even Bauer admits that he was getting loud during this discussion. (Bauer Tr. 36). Moreover, as both Bell and Taylor credibly testified, while Bauer's outburst began behind closed doors, after Bauer became threatening toward Taylor, Bell opened her office door for Bauer to leave. (Bell Tr. 81; Taylor Tr. 110). This did not discourage Bauer

from continuing to yell "fuck you" at Taylor, within earshot of the engineering employees Bauer admits were outside Bell's office. (Bauer Tr. 49) Bauer made no effort to contain his profanity to a secluded location and instead, continued to engage in his violent assault of Taylor regardless of the presence of observers.[12] This is the very type of misconduct the Board intended to lose protection under the Act.

2. The Subject Matter of the Discussion Weighs Neither in Favor of Protection or Lack of Protection

While the purpose of the meeting was to discuss Bauer's concerns about how he personally was being treated (and not protected concerted activity), the subject matter did move into protected concerted activity where Bauer raised concerns related to other Union members. However, this was merely a meeting to discuss concerns and should not reasonably have incited such hostility from Bauer. Nexteer called the meeting in response to concerns Bauer raised about his treatment – obviously attempting to address these concerns. This meeting then devolved into Bauer hostilely yelling about a variety of topics, arguably bringing up issues related to his role as Union committeeman. This was not a meeting where Bauer should have been upset or emotional. Instead, Nexteer was looking to address Bauer's concerns in an effort to make his work relationship with members of management better if possible. Despite the purpose of the meeting, Bauer was unable to control his emotions and became enraged and threatening toward Taylor.

At the hearing, the General Counsel implied Taylor and Bell were obligated to offer a "cooling off period" as set forth in Article VII, Section 2 of the parties' Agreement. However, by

[12] At the hearing, the General Counsel insinuated that Bell's door was closed at all times during the outburst because Nexteer's position statement did not mention Bell opening the door for the final outburst. While, as the ALJ properly acknowledged, a position statement can be used to demonstrate a shifting rationale, an omission does not evidence shifting rationale. As Taylor testified at hearing, he was not involved in drafting the position statement (Taylor Tr. 117) and his testimony is in no way inconsistent with the facts as set forth therein. Instead, his testimony merely supplements the facts set forth by Respondent in its position statement in the instant case.

the very language of the Agreement, a cooling off period was not required nor does the failure to provide one excuse Bauer's conduct. Article VII, Section 2 of the Agreement provides that "[t]he Company and the Local Union agreed that ***contemplated discipline*** should be discussed in a calm manner allowing for an objective evaluation of the facts." (Emphasis added) (GC Ex. 2, p. 31). There is absolutely no evidence Nexteer was contemplating discipline for Bauer – because it was not. Instead, it was attempting to work with Bauer to reach solutions for his issues. Moreover, the Agreement specifically provides that "**the parties recognized that certain actions such as assault or other serious acts of misconduct would render the 'cooling off' period totally inappropriate.**" (Id.) (emphasis added). Bauer engaged in the very type of misconduct the parties agreed a cooling off period would not help, even if a cooling off period were required, which it was not. The subject matter of the discussion, where it was not related to contemplated discipline, did not warrant a cooling off period. It similarly did not guarantee Bauer protection for his outburst where he became assaultive during what was intended to be a collaborative meeting.[13] Under these circumstances, the second *Atlantic Steel* factor is neutral and neither favors nor disfavors protection.

3. The Nature of Bauer's Misconduct – Profane, Threatening, and Violent Conduct – is not Protected by the Act

Language that is profane, loud, insubordinate, sustained and repeated is not protected by the Act. *See Waste Management of Arizona, Inc.*, 345 NLRB 1339, 1340 and 1353-54 (2005) (comments such as "this is fucking bullshit," "you're fucking with me because we're for the

[13] General Counsel's attempt to use the "cooling off period" article to downplay the seriousness of Bauer's misconduct blatantly ignores the final paragraph of the section in question:

> Additionally, it was mutually recognized that providing or not providing a "cooling off" period will be without prejudice to either party in the applications [sic] of any terms of the agreement and will not be cited or relied upon by an employee, the Union or Management on a basis for any claim. (Id.).

union," and "this isn't fucking Rush [which was the supervisor's name] Management" lost the Act's protection); *Aluminum Company of America*, 338 NLRB 20, 20-22 (2002) (comments such as "wonder how [the supervisor] is going to fuck us now," referring to supervisors as a "son of a bitch" and "those motherfuckers" lost the Act's protection); *Piper Realty*, 313 NLRB at 1289-90 (1994) (comments such as "he did not treat men like men, but like animals," "accusing a supervisor of "fucking with his job," and calling a supervisor "a fucking asshole" lost the Act's protection).

Here, there is no dispute that Bauer's statements were profane and threatening. As demonstrated by the Board's holdings in cases like *Cellco Partnership*, *Waste Management*, *Aluminum Co.*, and *Piper Realty*, this kind of conduct weighs in favor of Bauer losing the Act's protection under *Atlantic Steel*. "Employers and employees have a shared interest in maintaining order in the workplace, an order that is made possible by maintaining a certain level of decorum." *Trus Joist Macmillan*, 341 NLRB 369, 371 (2004). *See also Felix Industries v. NLRB*, 251 F.3d 1051, 1055 (D.C. Cir. 2001) ("If an employee is fired for denouncing a supervisor in obscene, personally-degrading ***or*** insubordinate terms . . . then the nature of his outburst properly counts against according him the protection of the Act." (emphasis added)).

But, this is not a case involving only profane conduct. Bauer escalated his misconduct where he aggressively threatened Taylor. Nexteer simply could not tolerate Bauer's blatant disregard for its Shop Rules and workplace violence policy. Nexteer must protect all of its employees, including Taylor, and cannot allow employees to engage in violent and threatening behavior even while engaged in Union activity. The Board has found less egregious actions than Bauer's lost the Act's protection, without even rising to the level of threatening gestures. In *Trus Joist Macmillian*, 341 NLRB 369 (2004), the Board found that the nature of the outburst – where the employee engaged in profanity and lewd gestures – weighed heavily against protection.

Similarly, in *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005), the Board noted, "The profanity involved more than a single spontaneous outburst," weighing against protection. Here, Bauer was not content just to yell profanities at Taylor (as he has done to other supervisors in the past) but rather, added threatening gestures (balled up fists, standing up within a foot of Taylor, and pointing at him) all while yelling profanities. In *Plaza Auto Ctr., Inc.*, 360 NLRB 972, 976 (2014), the Board specifically noted that the employee's actions were still protected because his standing up "was not menacing, physically aggressive, or belligerent," specifically noting the employee did not have a history of threatening behavior. (Emphasis added). In stark contrast to the protection provided in *Plaza Auto Ctr.*, Bauer, consistent with his history of improper behavior, balled his fists and got in Taylor's face so that Taylor feared he would be assaulted.

Moreover, this was not a matter of a Union representative having a spontaneous outburst of somewhat inappropriate language during the vigorous defense of a member during a grievance meeting. Instead, the meeting was set for the express purpose of seeking to address Bauer's concerns and help resolve issues he perceived related to his treatment. Bauer repaid Nexteer's gesture by threatening and intimidating Taylor when the topic of staffing was broached. He came into the meeting obviously upset and hostile and it only escalated from there, culminating in Bauer being asked to leave Bell's office before he got even more physical toward Taylor.

Prior to Bauer's outburst in the instant case, Nexteer established a workplace violence policy in an effort to prevent the very type of misconduct committed by Bauer. To ensure that all employees understood Nexteer's policy, Respondent conducted training with all employees including Bauer. (Bell Tr. 91; Getgood Tr. 151-52; R. Ex. 20; R. Ex. 21; R. Ex. 22). Bauer did not dispute that he received training on Nexteer's workplace violence policy nor does the General Counsel assert that Nexteer could not lawfully maintain its workplace violence policy. Nexteer's

expectation that employees refrain from violent and threatening behavior was also reiterated in the Shop Rules – rules Nexteer negotiated with the Union and of which Bauer, a Union steward, should have been aware. Despite his knowledge of Nexteer's policies, Bauer chose to engage in violent and threatening behavior.

The credible evidence presented at the hearing demonstrates that while Bell and Taylor were merely trying to address Bauer's concerns, he became enraged, standing up, fists balled within a foot of Taylor, yelling "fuck you, fuck you Benny Taylor." (Bell Tr. 80; Taylor Tr. 108). Where Bauer engaged in intimidating behavior, personally directed at Taylor and intended to intimidate, it is well established this conduct loses the Act's protection. *See e.g., Starbucks Coffee Co.*, 354 NLRB 876, 878 (2009), adopted in 355 NLRB No. 135 (2010); and *National Semiconductor Corp.*, 272 NLRB 973, 974 (1984). Moreover, while some profanity may be normal in the workplace, Bauer did not merely use profanity while discussing an issue with Bell and Taylor. Rather, he directed his profanity at Taylor in what was either uncontrolled rage or an intentional effort to intimidate. In either case, such conduct loses the Act's protection. *See Aluminum Co. of America*, 338 NLRB 20, 23 (2002).

4. The Lack of Provocation by Nexteer Weighs Against Protection

Like the first and third factors of *Atlantic Steel*, the fourth factor similarly weighs against protection. There is absolutely no evidence that Bauer was provoked into his threatening outburst by Nexteer or by Bell or Taylor. Rather, Bauer's outburst and intimidation was wholly of his own making. Bell and Taylor sat down with Bauer in an effort to ease concerns he had regarding his treatment at work; in response, Bauer became so upset that he became threatening. Instead of having a civil conversation, he became visibly agitated and only got more upset as the conversation went on, culminating in him standing up, fists balled, yelling threatening profanity at Taylor. Even

assuming *arguendo* Bauer's uncorroborated assertion Taylor also used profanity during this meeting is true, the use of profanity alone (where not directed at Bauer or otherwise offensive) could hardly serve as provocation for Bauer's misconduct. Differences in degree are differences in kind.

Considered in totality, Bauer's actions in this case lost protection under the Act. Nexteer properly discharged Bauer for his violations of Nexteer's workplace violence policy and Shop Rule #9. The Complaint allegations asserting Respondent unlawfully terminated Bauer while he was engaged in protected concerted activity must be dismissed.

C. Nexteer Terminated Bauer Only As a Result of His Threatening Outburst and Not in Response to His Prior NLRB Involvement

Unlike the allegation alleging a violation of Section 8(a)(3) of the Act, the Complaint allegation claiming Nexteer violated Section 8(a)(4) of the Act when it terminated Bauer is viewed under the standard established in *Wright Line*, 251 NLRB 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *see also Am. Gardens Mngmt. Co.*, 338 NLRB 644 (2002) (stating that the Board applies the *Wright Line* framework to 8(a)(4) discipline and/or termination cases). Under *Wright Line*, the General Counsel has the initial burden to show by a preponderance of the evidence:

(1) the employee's protected activity;

(2) the employer's knowledge of the activity;

(3) the affected employee suffered an adverse employment action; and

(4) the protected activity was a substantial or motivating reason for the adverse action.

See id. at 1089.

If the General Counsel establishes this prima facie case, the burden shifts to the employer to demonstrate a "legitimate business reason" or justification for the action or otherwise

demonstrate that it would have taken the same action even in the absence of the employee's protected activity. *Id.* at 1088; *see also Palms Hotel & Casino*, 344 NLRB 1363, 1363 (2005) (finding lawful a written warning to union supporter because employer proved that it would have issued warning even in the absence of union activity). If the employer makes that showing, the burden shifts back to the General Counsel to "show that Respondent's defense was pretextual." *Flamingo Las Vegas*, 360 NLRB No. 41 (2014) (finding that the General Counsel did not establish pretext where the employer sufficiently explained the reasoning behind an employee's discipline).

1. Bauer's Involvement in Prior Board Proceedings Was Not a Motivating Reason for His Termination

Under the *Wright Line* standard, the General Counsel failed to demonstrate that Bauer's prior involvement in Board proceedings was a substantial or motivating reason for the adverse action.[14] Rather, the evidence presented at hearing establishes Bauer was terminated solely as a result of his threatening and profane outburst toward Taylor, in violation of Nexteer's Shop Rule #9 and workplace violence policy. There was no credible evidence presented that the relevant decisionmakers held any animus toward Bauer for his prior Board filing.

Realizing that Nexteer does not harbor any animus toward the Union generally and that Bell and Pruitt routinely work with numerous other Union officials without issue, the General Counsel apparently contends that Nexteer harbored some animus toward Bauer individually though not the Union as a whole. In order to advance that theory, Bauer and Reyna-Frost gave inconsistent testimony about some alleged isolated statements that were denied directly by both Bell and Pruitt. Notably, while Bauer claimed Pruitt said he didn't blame supervisors for not

[14] It is significant that the General Counsel has not asserted that Nexteer's discharge of Bauer violated the terms of the Settlement Agreement in 07-CA-192926 and 07-CA-197608. (GC Ex. 4). This failure supports the conclusion that Nexteer has not violated the Act in any respect, since the Settlement Agreement expressly incorporates the requirements of Sections 8(a)(3) and (4).

communicating with Bauer "because nobody wants to end up in front of the NLRB Board," Pruitt denied making any such statement. (Bauer Tr. 26; Pruitt Tr. 178). Bell corroborated Pruitt's denial and confirmed that Pruitt made no reference to the NLRB as claimed by Bauer. (Bell Tr. 72). Reyna-Frost, who notably did not testify about any issues she has ever had with Nexteer while working as a Union official, then claimed not only did Pruitt make a statement regarding the NLRB, so did Bell. Reyna-Frost claimed at the hearing that Bell said when she hears the name Bauer, "she thinks NLRB." (Reyna-Frost Tr. 65). Not only is this a nonsensical claim as Bell would have no reason to harbor any animus toward Bauer as she was new in her role, Bauer did not even corroborate this claim. Though Bauer provided extensive "details" about most of his conversations leading up to the outburst, he did not testify that Bell made any similar comments. If in fact Bell had made the comment as Reyna-Frost contends, it is strains belief that Bauer would not have recalled this statement, especially given the lengthy description he gave of most conversations he had. Pruitt and Bell both credibly denied making the statements as claimed by Bauer and Reyna-Frost. (Bell Tr. 72; Pruitt Tr. 178-79). The credible evidence overwhelmingly demonstrates that the only motivating factor in Bauer's termination was his threatening and profane outburst toward Taylor.

2. Nexteer Had a Legitimate Reason to Terminate Bauer Based on His Violation of Shop Rule #9 When he Engaged in a Violent and Profane Outburst

Moreover, even assuming *arguendo* the General Counsel could establish Bauer's prior Board proceedings were a factor in Nexteer's decision to terminate Bauer, Nexteer had a legitimate business reason to terminate Bauer after he engaged in a threatening, intimidating, and profane outburst toward Taylor, in violation of Shop Rule #9. As set forth *supra*, Bauer repeatedly flouted Nexteer's rules and displayed disrespect for both his employer and supervisors. He routinely

engaged in insubordinate, profane, and inappropriate conduct under the guise of Union activity. In fact, in many of these instances, the Union ultimately agreed some level of discipline was appropriate. Despite these frequent reminders of Nexteer's expectation that he stay within the reasonable bounds while acting as a Union representative, Bauer nonetheless engaged in opprobrious conduct when he acted threateningly and intimidatingly toward Taylor, yelling profanity at him and aggressively pointing at him from mere inches away. There is no doubt this conduct was intimidating toward Taylor. Taylor credibly admitted as such. (Taylor Tr. 110, 115). In accordance with Shop Rule #9 which prohibits "[a]ssaulting, threatening, intimidating, coercing or interfering with supervision" and given the severity of the misconduct, Bauer was terminated. There is no dispute that Nexteer has the right and obligation to maintain a safe work environment for all employees, including supervision, and cannot tolerate threatening behavior. Nexteer had a legitimate reason to terminate Bauer and in the past two years has terminated 14 other employees for violations of Shop Rule #9 or the workplace violence policy (where Shop Rule #9 may not otherwise be applicable). (R. Ex. 24 & R. Ex. 25). The General Counsel presented absolutely no evidence that other employees engaged in similar misconduct and were not disciplined or that Nexteer's explanation for its actions were pretextual. As such, the General Counsel failed to establish that Nexteer unlawfully terminated Bauer in retaliation for his participation in Board proceedings. Accordingly, the allegation in the Complaint asserting a violation of Section 8(a)(4) of the Act must be dismissed.

D. The General Counsel Failed to Meet Its Burden to Establish Any Disparate Enforcement of Rules

The Complaint alleges Nexteer disparately and selectively enforced its shop rules, namely Shop Rules #9 and #13, to discharge Bauer; however, the General Counsel fell woefully short of meeting its burden to establish Nexteer violated the Act as alleged. *See e.g., Elec. Workers IBEW*

Local 77 (Bruce-Cadet), 289 NLRB 516 (1988). As an initial matter, there was absolutely no evidence Nexteer applied Shop Rule #13 in discharging Bauer. Despite the allegation in the Complaint, Respondent did not apply Shop Rule #13 in disciplining Bauer. Rather, all of the evidence presented at the hearing establishes that Bauer was discharged in light of his violation of Shop Rule #9. (GC Ex. 5). The General Counsel failed to establish that any other employees engaged in conduct similar to Bauer and were treated less severely. Instead, the evidence demonstrates that Nexteer terminated other employees for violations of Shop Rule #9 and the workplace violence policy. (R. Ex. 24 & 25).

Moreover, while the General Counsel contended at the hearing that Bauer was a Union steward at the time of his discharge and therefore should be held to a different standard than other employees, the case authorities cited above refute this contention. The General Counsel has failed to establish that Nexteer disparately enforced its rules to discharge Bauer where he is the only "comparator" presented.

The General Counsel contends that a human resources employee, Casey Jobson ("Jobson"), served as an example of disparate enforcement; however, Jobson's incident was significantly different that Bauer's outburst. While Jobson used profanity, saying a grievance was "bullshit" and it was "fucking ridiculous that the Union can file grievances that have no merit," Bauer was not terminated because he used profanity. Instead, he was terminated because he used profanity, ***directed at Taylor*** (not merely in generalities), while yelling and physically intimidating Taylor. Bauer admitted that profanity is commonplace (Bauer Tr. 20) so Jobson did not engage in any extraordinary misconduct. This is not merely a case of profanity. This is a case where an employee got so enraged during a meeting to discuss issues he was having, stood up while within feet of a supervisor, pointing his finger, yelling "fuck you" repeatedly at the supervisor. Bauer did not

merely use profanity while discussing an issue. He was physically intimidating and threatening and for that, he was terminated. The General Counsel fell woefully short of meeting its burden to establish that other Union officials engaged in similar misconduct but were treated less severely. As such, the Complaint allegation asserting Nexteer disparately enforced its Shop Rules against Bauer must be dismissed.

V. CONCLUSION

Consistent with the facts and authority cited above, the Complaint should be dismissed in its entirety.

Respectfully submitted,

By: */s/ Kim F. Ebert*

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Dated: September 24, 2018

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SEVEN

NEXTEER AUTOMOTIVE CORP.,

Respondent,

and **Case No. 07-CA-215036**

LOCAL 699, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO,

Charging Party.

CERTIFICATE OF SERVICE

I do hereby certify that on September 24, 2018, a true and correct copy of the foregoing Post-Hearing Brief was *Electronically Filed* on the NLRB's website http://www.nlrb.gov.

Also, I do hereby certify that a true and correct copy of the foregoing Post-Hearing Brief has been served by electronic mail this 24th day of September, 2018 on: Stuart Shoup at SShoup@uaw.net and Scott Preston at preston.scott@nlrb.gov.

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